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No. 75-636

IN THE

Supreme Court of the United States

October Term, 1975

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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Petitioner, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, replies to the Government's Brief in Opposition as follows:

I.

The Government refuses to acknowledge or respond to the first three questions presented in the Petition for Certiorari. Instead they construct their own questions (Opposition pp. 2-3), two of which, in the Government's rendition, purportedly present only factual issues,[1] and the third

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[1] See Government questions 1 and 2 (Opposition p. 2).

We, of course, acknowledge that facts are for the lower courts to determine. We do not present factual questions. We do respectfully insist that statistics as to present incumbency are not in themselves probative of discrimination, and that ongoing post-Act patterns of discriminatory hiring or job assignments must appear (See Peti-

attempts to present a question which is not in the case.

The Opposition is taken principally with attacking its straw-man, and arguing that courts have the power "to fashion a remedy involving retroactive seniority."[2] We agree!

But among the questions, which the Government does not speak to, are whether such a remedy may be applied wholesale, as here, on the basis of race; or whether it may be applied only to those shown to be adversely affected by unlawful racial discrimination?

II.

The Solicitor General is squarely on both sides of this most important question in the case.[3]

Here, he asserts (Opposition p. 15) ". . . *The courts need not engage in an exhaustive case-by-case analysis of the treatment of each minority employee.*" This assertion is made in support of the decision below, in which the Court

tion pp. 24-27); and that proof of the employer's racial discrimination is not proof that the union discriminated, particularly in light of the stipulated facts (See Petition pp. 5-9 and 19-24).

[2] Opposition pp. 17-18. The cases so holding are legion. But except for the spate of Fifth Circuit motor carrier cases now before this Court on application for certiorari, none of the cases in the circuit courts which the Government cites granted seniority carry over to individuals who had not been affected by unlawful racial discrimination.

[3] Question 3: "Assuming *arguendo* the validity of a finding of unlawful pattern or practice of racial discrimination, in fashioning a remedy . . . may fictional seniority benefits be awarded to all minority employees solely on the basis of their race, without regard to whether they were individually affected by the unlawful pattern or practice?" Petition for Certiorari p. 3.

of Appeals has rejected the trial Court's focus upon individual claimants—and has awarded augmented seniority to the entire class, without regard to whether individual class members were adversely affected by racial discrimination.

Yet less than three months ago, in the "Memorandum of the United States Amicus Curiae" in the *Jersey Central Power & Light Co.* case[4] the Solicitor General advised this Court:

> "But the Act does not require giving black (or other minority-group) employees enhanced seniority rights on the basis of their race simply because other black applicants were previously denied employment on the basis of their race. Treating black employees differently for purposes of layoffs solely because they are black, when they have not themselves previously suffered individual discrimination by the employer, would amount to preferential treatment on the basis of race within the meaning of Section 703(j) of the Act, 42 U.S.C. § 2000e-3(j).

We believe the Solicitor General was right in *Jersey Central*—and is wrong here. But in either event the issue is of importance; the uncertainty is certain, and should be allayed by decision here.[5]

III.

If the Court of Appeals had actually provided relief only for those minority employees "who qualified for the better

[4] No. 75-182, October Term, 1975, *Equal Employment Opportunity Commission* v. *Jersey Central Power & Light Co.*, et al, on certiorari from the Third Circuit 508 F.2d 687.

[5] Indeed in *Jersey Central*, the Solicitor General recognized the "substantial importance" of the question, and urged that certiorari be granted, even though the Department of Justice was not in agreement with the EEOC's reading of this statute.

paying jobs but were assigned to less desirable low paying jobs because of their race and national origin" as the Government's question number 3 asserts (Opposition p. 3), we would not be seeking certiorari.

The Court of Appeals specifically refused to order relief limited to those shown to have been adversely affected by racial discrimination, and substituted class relief benefiting all minority employees, solely on the basis of race, without regard to whether the individual beneficiaries of the order were assigned to less desirable jobs because of their race and national origin.

The trial court had ascertained those affected by unlawful racial discrimination, and had provided relief—assignment to "rightful place"—i.e., the job assignment and the seniority which the discriminatee would have enjoyed absent discrimination.[6]

The Court of Appeals specifically rejected this remedy—and substituted class relief for all minorities, whether or not each member of the class was a victim of racial discrimination.

In so doing the Court of Appeals exceeds its authority "to restore discriminatees to a position where they would

[6] The Government misstates our position when it asserts that Petitioners challenge the Court of Appeals' ruling that T.I.M.E.-D.C.'s minority employees are entitled to use their pertinent accumulated seniority in bidding for jobs from which they had been unlawfully excluded in the past." (Opposition p. 15.)

[7] The quotation appears on p. 17 of the Government's Opposition, where it is in turn quoted from the legislative history, 118 Cong. Rec. 7565.

have been were it not for the unlawful discrimination."[7]

IV.

Yet, the Government continues to insist ". . . the courts need not engage in an exhaustive case-by-case analysis of the treatment of each minority employee" (Opposition p. 15).

How can an individual's "rightful place" be ascertained unless that is done?[8]

WHEREFORE certiorari should be granted as prayed.

Respectfully submitted,

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[8] Title VII remedies were designed to track those applied by the National Labor Relations Board. See *Albemarle Paper Co.* v. *Moody*, ... U.S. ..... 45 L.Ed 2d 280, at 297. The NLRB may not grant employees back pay or seniority on a mere showing that an employer is anti-union. Proof that individuals were denied pay or seniority as a result of the employer's antipathy to the union activity is required before back pay or augmented seniority can be awarded.